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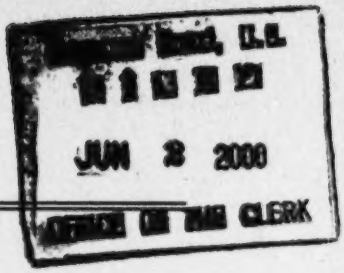

No. 99-1388

In The

Supreme Court of the United States

PHELPS DODGE CORPORATION, ARIZONA PUBLIC SERVICE COMPANY, GILA VALLEY IRRIGATION DISTRICT, AND FRANKLIN IRRIGATION DISTRICT,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Petitioners Phelps Dodge Corporation, Arizona Public Service Company, Gila Valley Irrigation District and Franklin Irrigation District (hereafter collectively "these Petitioners"),[1] respectfully submit this Reply Memorandum in support of their Petition for Writ of Certiorari to the Supreme Court of the State of Arizona (Petition No. 99-1388). A total of four Briefs In Opposition to this Petition were filed with this Court. The Respondents in Opposition are the United States; the Gila River Indian Community; the San Carlos Apache Tribe, Tonto Apache Tribe and Yavapai-Apache Nation (collectively "the Apache Respondents"); and the Hopi Tribe, Navajo Nation and San Juan Southern Paiute Tribe (collectively the "Little Colorado Respondents"). The four Briefs In Opposition raise several issues not previously addressed by these Petitioners. Accordingly, pursuant to Rule 15.6, Rules of the Supreme Court of the United States, these Petitioners submit this Reply to address each of these new issues.

I. The Respondents Argue a Question Not Presented by These Petitioners.

Both the United States and the Gila River Indian Community include in their respective Briefs In Opposition a Question Presented that differs from the question posed by these Petitioners. Specifically, the United States presents the question "[w]hether a federal reserved water right may be satisfied from groundwater that, under Arizona law, is not subject to the doctrine of prior appropriation." The Gila River Indian Community, asks "[d]o federal reserved water rights extend to groundwater

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[1] The corporate disclosure statement required by Rule 29.6, Rules of the Supreme Court of the United States, is included in Petition No. 99-1388 at page v. The information in that statement continues to be accurate.

(underground water) that is not subject to prior appropriation under Arizona law?" However, these restated questions miss the point these Petitioners have raised.

Rather than debating the hypothetical question of whether there can, under any circumstances, be a reserved right to groundwater, these Petitioners argue that: (1) the Arizona Supreme Court acted prematurely in concluding, "in the abstract,"[2] that there is a reserved right to groundwater, without having first determined the purposes for which any specific reservation was established by the federal government; (2) that the Opinion Below fails to integrate federal groundwater rights with existing state groundwater law; and (3) that the Opinion Below rejected application of state groundwater law as the rule of decision for determining federal rights to groundwater without conducting the analysis required by *United States v. Kimbell Foods*, 440 U.S. 715 (1979) and *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979). It is this last point that is at the heart of these Petitioners' Question Presented:

> May a state court create federal common law to govern a federal reservation's groundwater rights where nondiscriminatory state law already provides a rule of decision giving all landowners in the State equal rights to groundwater?

For all of the reasons asserted by these Petitioners in Petition No. 99-1388, the answer to this question clearly is "no." An effort by Respondents to reformulate the Question Presented in a manner more to their liking cannot change this answer. The Arizona Supreme Court has inappropriately created federal common law in a manner that conflicts with the prior opinions of this Court. Therefore, certiorari should be granted at this time to correct

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[2] *In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 748 (Ariz. 1999) ("Opinion Below"), ¶ 31, *see* Pet. App. A24.

the lower court's error before thousands of parties are forced to endure years of costly litigation based on an incorrectly decided question of federal law. *See Merchantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

II. Arizona Groundwater Law is Not Unique; This Case Will Have Broad Implications Both in Arizona and in Many Other States.

Two of the Respondents repeatedly assert that Arizona's bifurcated system of water law, under which surface water is subject to the doctrine of prior appropriation while "percolating" groundwater is subject to the doctrine of reasonable use, is "unique."[3] This assertion is made in support of the proposition that the Opinion Below will have narrow application and will not affect any person outside of Arizona. In fact, the Gila River Indian Community goes so far as to assert that the Arizona Supreme Court's determination on Issue 4 in the Opinion Below will affect "only 1% of Arizona's current population – less than 20,000 people – and only 2% of current water use." Gila River Indian Community Brief In Opposition, p. 15. However, on each of these points, the Respondents are simply wrong.

A. Most States Do Not Apply the Prior Appropriation Doctrine to Groundwater.

Arizona's groundwater law is not unique. As the State of Arizona has noted, at least five western states in addition to Arizona (California, Hawaii, Texas, Nebraska and Oklahoma), apply the prior appropriation doctrine to surface water, but do not apply it to percolating groundwater. *See* Response of the State of Arizona In Support of Petitions For Writs of Certiorari (Mar. 13, 2000), pp. 16-17,

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[3] *See, e.g.*, Little Colorado Respondents' Brief In Opposition, pp. 2, 24; Gila River Indian Community's Brief In Opposition, pp. 13-14.

fn. 20. In these states alone, more than 56 million people reside. This is more than 22% of the United States' total population. E. Byerly and K. Deardorff, National and State Population Estimates: 1990 to 1994 (U.S. Bureau of the Census, Current Population Reports) p. 25-1127 (1995).

In addition, many eastern states apply some variation of the doctrine of reasonable use to their groundwater resources.[4] Other states apply some version of the "absolute dominion" rule,[5] and still others apply a "correlative rights" doctrine to groundwater.[6] In fact, only 12 states apply a prior appropriation scheme to groundwater.[7]

As its Brief In Opposition makes clear, the United States believes that the federal reserved rights doctrine can be applied in states that have not adopted "an appropriative water rights system." *See* United States Brief In

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[4] *See* Robert E. Beck, *Waters and Water Rights*, Vol. 3, Part IV, chapter 23 (1991), identifying New Hampshire, Iowa, Kentucky, Michigan, Pennsylvania, West Virginia, Ohio, Washington and Illinois as applying the doctrine of reasonable use.

[5] *See id.*, chapter 21. These states are Texas, Indiana, Louisiana, Connecticut, Georgia, Maine, Maryland, Mississippi, Massachusetts and Rhode Island. The absolute dominion rule, in its purest form, holds that a landowner may take groundwater from underneath his land to whatever extent he pleases.

[6] *See id.*, chapter 22. The "correlative rights" states are California, New Jersey, Minnesota, Arkansas, Delaware, Missouri, Wisconsin, Florida, Tennessee, Alabama, North Carolina, Nebraska and Vermont. This doctrine applies the law of riparian rights to groundwater. However, in times of shortage, western correlative rights states generally require a prorationing of groundwater while eastern correlative rights states do not.

[7] *See id.*, chapter 24. These states are Utah, Montana, Nevada, Kansas, Wyoming, New Mexico, Alaska, Colorado, North Dakota, Oklahoma, South Dakota and Oregon.

Opposition, p. 17, fn. 6. If this is true, then the Opinion Below could be applied in any of these states without any effort to integrate federal groundwater rights with the rights of all other residents of those states. That is exactly the problem with the Opinion Below – it creates a federal common law rule that operates independently of, and at odds with, the prevailing system of groundwater law in the State of Arizona. If such a conflict is allowed to occur in Arizona, it can also occur in any other state. This issue clearly is of national significance.

This point is well-illustrated by Respondent Gila River Indian Community in its Brief In Opposition. The Community notes that "[w]ater law varies widely from state to state – with individual peculiarities depending on the hydrology, geology, water needs, and the legal and hydrologic history of the particular state." Gila River Indian Community Brief In Opposition, p. 9. Precisely because there are significant variations in water law from state to state, *Kimbell Foods* and *Wilson* dictate that state law should be adopted as the rule of decision governing federal rights to groundwater, in lieu of a federal common law rule. Rather than requiring a "nationally uniform body of law," *Kimbell Foods*, 440 U.S. at 728, federal rights to groundwater, in Arizona and elsewhere, should be determined by "[b]orrowing state law" as the rule of decision to "avoid arriving at one answer . . . in disputes involving Indians on one side and possibly quite different answers with respect to neighboring land where non-Indians are the disputants." *Wilson*, 442 U.S. at 674.

B. Issue 4 Will Affect Millions of Arizona Residents.

As noted above, the Gila River Indian Community asserts that fewer than 20,000 Arizona residents will be affected by Issue 4. This assertion appears to be based on the Community's conclusion that Issue 4 will apply only to "those reservations that do not have surface water resources available to them and have not had surface

water resources in the past." Gila River Indian Community Brief In Opposition, p. 15. However, nothing in the Arizona Supreme Court's Opinion Below indicates any such limitation on the reach of Issue 4.

In fact, to the contrary, the Arizona court's incorrect determination of Issue 4 will impact literally millions of Arizona residents if not corrected by this Court. This is clearly demonstrated by the claims of both the Gila River Indian Community and the other tribal Respondents in Opposition. For example, the Gila River Indian Community has asserted claims in the Gila River adjudication that total more than 1,500,000 acre-feet of water. *See* Statement of Claimant ("SOC") No. 39-12652, filed June 30, 1980.[8] This is substantially more than the average annual surface water flow of the Gila River. Obviously, the balance would need to be obtained from the groundwater resources of central Arizona. In fact, the Community affirmatively asserted a right to groundwater in its Statement of Claimant, and it has vigorously pressed that claim in all subsequent proceedings.[9]

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[8] Statements of Claimant are the formal documents submitted to the adjudication court by each of the more than 24,000 parties who claim water rights in the Gila River General Stream Adjudication. They were required to be filed in response to the summons issued by the superior court at the outset of the Gila Adjudication. *See* A.R.S. §§ 45-253, 45-254. Statements of Claimant serve as the functional equivalent of the answer in a more typical civil case. Claimants are required to set forth "the particulars of [their] claim[s] on the court-approved statement of claimant form. . . . " A.R.S. § 45-254.A. The Arizona Department of Water Resources maintains publicly available copies of all Statements of Claimant filed in both the Gila and Little Colorado River Adjudications.

[9] *See* SOC No. 39-12652. The Community has consistently asserted a broad right to groundwater, including very recently demanding, in a pleading filed in the Gila River Adjudication, that "the Salt River Project and its member landowners, and all other non-Indians, halt all pumping of underground water that

The groundwater to which the Community makes claim constitutes a common resource shared by both the Community and the residents of central Arizona. Much of that resource exists in the Phoenix Active Management Area ("Phoenix AMA"), a legally defined groundwater basin that encompasses a substantial portion of the Gila River Indian Community's reservation, as well as nearly the entire metropolitan area of Phoenix, Arizona. *See* Arizona Department of Water Resources, Third Management Plan for the Phoenix Active Management Area, Dec. 1999 (hereafter "Phoenix AMA Third Management Plan"). According to the Arizona Department of Water Resources, the Phoenix AMA was home to more than 2,500,000 persons in 1995. *Id.*, p. 2-4.

Approximately 39% of the water used by these residents is groundwater from the aquifers underlying the Phoenix AMA. *Id.*, p. 3-3 (1995 data). If the Gila River Indian Community is allowed to claim a reserved right to groundwater that conflicts with Arizona's non-appropriative system of groundwater management, that claim will have an obvious and dramatic impact on all other residents of the Phoenix AMA.[10]

A similarly dramatic impact can be expected to result from the claims of the other tribal Respondents to Petition No. 99-1388. For example, the San Carlos Apache

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interferes with the water supply and water rights of the Community, and its members and Allottees, in accord with the recent decision of the Arizona Supreme Court on Interlocutory Issues 4 and 5." Response In Opposition to The Motion For Partial Summary Judgment Re Preclusive Effect of 1907 Sacaton Agreement, p. 12 (Jan. 26, 2000).

[10] As the Arizona Department of Water Resources notes, "water use by [Indian communities in the Phoenix AMA] is exempt from regulation by the state. However, it is important to include these uses in an assessment of water use for the AMA as the demand characteristics of these communities have a hydrologic impact on the safe-yield goal." *Id.* at 3-1.

Tribe claims a right to more than 775,000 acre-feet of water from the Gila River System. *See* SOC Nos. 39-63614 (Nov. 1, 1985), 39-12676 (Sept. 16, 1985). These Statements of Claimant explicitly assert a right to "groundwater, whether such sources are on or off the Reservation. . . . " *Id.* The San Carlos Apache Reservation shares a number of large groundwater basins with neighboring non-Indian communities whose groundwater rights are determined by state law.

In the Little Colorado General Stream Adjudication, the Navajo Nation, Hopi Tribe and San Juan Southern Paiute Tribe have all made claims to large quantities of water, including groundwater. For example, the Navajo Nation claims 514,043 acre-feet of water, including 93,691 acre-feet of groundwater for irrigation purposes. *See* SOC No. 39-91442 (Nov. 27, 1985). The Hopi Tribe claims 140,406 acre-feet of water, including more than 17,000 acre-feet of groundwater for irrigation. *See* SOC No. 39-91443 (Nov. 29, 1985). The San Juan Southern Paiutes claim 22,326 acre-feet of water, including 22,010 acre-feet of groundwater for irrigation. *See* SOC No. 39-91713 (Dec. 31, 1991). These three tribes share a large regional aquifer with neighboring non-Indian communities in the Little Colorado River Basin.

In each of these instances, if the tribes in question are allowed to assert a reserved right to groundwater that is not defined in a manner consistent with the state law rights of their neighbors, needless conflict will result, and arbitrary differences in water rights will be created. It is exactly this outcome that *Wilson* seeks to avoid by directing that non-discriminatory state law be adopted as the federal rule of decision when there "is no need for a uniform national rule. . . . " *Wilson*, 442 U.S. at 673.[11]

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[11] The Little Colorado Respondents' assertion that "states would be free to enact ostensibly non-discriminatory legislation which actually is aimed at defeating federal and Indian tribal water rights," Little Colorado Respondents' Brief In Opposition,

III. No Federal Reservation in Arizona has been "Entirely Dewatered."

The Apache Respondents make repeated references to the Arizona Supreme Court's assertion that "[s]ome Indian reservations have been entirely 'dewatered' by off-reservation pumping." Opinion Below, ¶ 30, 989 P.2d at 748 (Pet. App. A23). *See* Apache Respondents' Brief In Opposition, pp. 2, 12. However, this assertion by the court below is demonstrably untrue. The case cited for this proposition by the Arizona Supreme Court does not state that the Gila River Indian Reservation (or any other) has been "entirely dewatered." *See Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 665-6 (1986).

Moreover, the Arizona Department of Water Resources has estimated that "approximately 22 million acre-feet [of groundwater] were in storage [under the Gila River Indian Reservation] in 1998 to a depth of 1,000 feet below land surface." *See* Arizona Department of Water Resources, Preliminary Hydrographic Survey Report for the Gila River Indian Reservation, Feb. 1999, p. 3-71. The total volume of groundwater in storage under the reservation, including amounts below 1,000 feet, is estimated to be 59 million acre-feet. *Id.* In contrast, the total amount of groundwater depleted from storage under the Gila River Indian Reservation during the entire period from 1900 through 1998 is estimated to be only 1,045,000 acre-feet. *Id.* In fact, in the more recent period of 1983 through 1998, the Department of Water Resources estimates that groundwater in storage has actually increased by an average of more than 73,000 acre-feet per

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p. 21, is simply unfounded. State laws either are or are not discriminatory. Only nondiscriminatory state laws may be incorporated as a federal rule of decision. *Kimbell Foods*, 440 U.S. at 740.

year. *Id.* at 3-75. Groundwater levels under the reservation are estimated to have risen approximately 55 feet during this time. *Id.* at 3-76.

This is hardly a situation where the reservation has been "entirely dewatered." Although off-reservation groundwater withdrawals have undeniably had an impact on groundwater resources under the Gila River Indian Reservation, *see id.*, it is also undeniably true that the Reservation continues to have access to a very substantial groundwater resource – a resource that it has shared and must continue to share with its non-Indian neighbors. The only way to effectively manage this shared resource is to apply the same basic legal concepts to the rights each neighbor, Indian and non-Indian alike, may assert. *Wilson* dictates this result, and the Arizona Supreme Court's incorrect determination of this important issue of federal law should be corrected by this Court without delay.

IV. Conclusion.

For all of the reasons asserted by these Petitioners in Petition No. 99-1388, and for each of the additional reasons set forth in this Reply, the Petitioners respectfully request that this Court issue a Writ of Certiorari to review and reverse the Opinion Below.

Dated, Phoenix, Arizona, June 1, 2000.

Respectfully submitted,

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